Close analysis of the remaining two rationales reveals that such reasoning is consistent with federal law and is supported by substantial evidence. These two arguments are: (1) the Agreements use of the word "billable" requires reciprocal compensation for Internet traffic because Ameritech bills such calls as local; and, (2) the industry use of the word "terminates" requires a finding that the call to the ISP terminates at the ISP.

First, the "billable" rationale is a reasonable interpretation of the contracts. Ameritech argues that such a reading is wrong as a matter of law, contending that the Agreements define local traffic based not on billing treatment, but on points of origin and termination of the traffic. (Ameritech Resp. at 14.) Ameritech further informs that the billing practice for Internet calls is identical to the billing treatment of FGA calls, and therefore the Commission's holding would make FGA calls "local." Ameritech does not cite any cases to support this proposition. Furthermore, Ameritech ignores the fact that the Agreements specifically exclude FGA calls from the reciprocal compensation provision. No such explicit provision is found in the Agreements regarding Internet calls. In fact, the Internet and ISPs are not even mentioned in the Agreements. No doubt the next time Interconnection Agreements are negotiated between the parties such a provision regarding the termination of Internet calls will be the subject of vigorous discussion. However, this court will not impose such a provision into the Agreements as written.

(Ameritech Merits Brief at 10.) However, Ameritech does not cite a single statute or ruling in support of this view. Although it may be appealing to analogize the two types of calls as functionally similar, this court will not be swayed by such argument. As previously discussed, a special provision in the Interconnection Agreements explicitly excludes FGA calls from paying reciprocal compensation. No such exception is provided for Internet calls.

Although reasonable persons may differ on the interpretation of the language of the Agreements, a finding that calls that are billed as local must receive reciprocal compensation is not violative of current federal law. Furthermore, such a finding is a reasonable interpretation of the contracts and is neither arbitrary nor capricious. It is undeniable that Ameritech has consistently billed it customers for their calls to ISPs as local calls. This court therefore concurs with the ICC's conclusion that the Ameritech billing scheme warrants a finding that such calls are subject to reciprocal compensation.

Second, this court finds that the ICC's determination that calls to the ISP terminate at the ISP is not contrary to federal law and is supported by substantial evidence. Ameritech's argument that federal law requires that this court adopt a "jurisdictional" standard for termination that would be measured on an "end-to-end" basis is not convincing. Although Ameritech is correct that "end-to-end" language is used in some earlier FCC decisions in different contexts,[11] the FCC has not issued any rulings indicating that Internet calls must be measured on an end-to-end basis, with the ultimate web site qualifying as one "end." Furthermore, all of the cases cited by the plaintiff in support of its end-to-end argument are from the pre-1996 Act era. (See Ameritech Mem. at 17-18.)

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[11] See, e.g., Southwester Bell Tel. Co. Transmittal Nos. 1537 & 1560 Revisions to Tariff F.C.C. No. 68, Order Designating Issues for Investigation, 3 F.C.C. Rcd. 2339, ¶ 28 (1988) (rejecting the view that two calls are created by the use of a 1-800 number for a credit card call and stating that "[s]witching at the credit card switch is an intermediate step in a single end-to-end communication."); Petition for Emergency Relief and Declaratory Ruling Filed by the Bellsouth Corporation, 7 F.C.C. Rcd. 1619, 1619-21 (1992) (finding that a call to an out-of-state voice mail service is a single interstate communication); Long-Distance/USA, Inc., 10 F.C.C. Rcd. 1634, ¶ 13 (1995) (finding that 1-800 calls are a single communication; "both court and Commission decisions have considered the end-to-end nature of the communication more significant than the facilities used to complete such communications).

Instead of classifying the web sites as the jurisdictional end of the communication, the FCC has specifically classified the ISP as an end user. See, e.g., Third Report and Order ¶ 288. Given the absence of an FCC ruling on the subject, this court finds it appropriate to defer to the ICC's finding of industry practice regarding call termination. Indeed, the Internet Agreements themselves authorize the Commission to determine when a call qualifies as "local."[12]

The ICC's decision included the following finding of fact regarding call termination:

> [W]e are persuaded by Mr. Harris' explanation of industry practice with respect to call termination. He testified that call termination within the public switched network "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned . . ."

(Order at 11.) This definition of "termination"[13] is crucial to understanding the meaning of the Agreements, as the Agreements specifically use the word termination in defining reciprocal compensation. When a customer of a LEC dials the ISP's local, seven-digit number, the customer

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[12] TCG's Agreement provides that "local traffic" is "local service area calls as defined by the Commission." (TCG § 1.43.) The Agreements of the other Carrier defendants provide that a "local call" is:

> a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V & H coordinates of the terminating NXX, or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; provided that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

(MFS § 1.38; MCI § 1.2; AT&T § 1.2; Focal § 1.46.) (emphasis added).

[13] The ICC's definition of "termination" closely follows that adopted by the ICC. See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, ¶ 1040 (Aug. 8, 1996) ("We define 'termination,' for purposes of section 251(b)(5) [the reciprocal compensation provision of the Telecommunications Act], as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises.").

is connected to the ISP. Once this "call connection" is established between the caller and the telephone exchange service of the seven-digit number, the call is deemed "terminated" for purposes of the Agreements. The fact that the ISP then connects the user to the Internet, where the user may access unlimited web sites, does not alter the fact that the call has been "terminated" at the ISP for purposes of reciprocal compensation.

J. THE ICC ORDER VIOLATES SECTION 251(G) OF THE ACT

Ameritech's final argument is that the ICC's order violates Section 251(g) of the Telecommunications Act. Pursuant to Section 251(g),

> On or after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

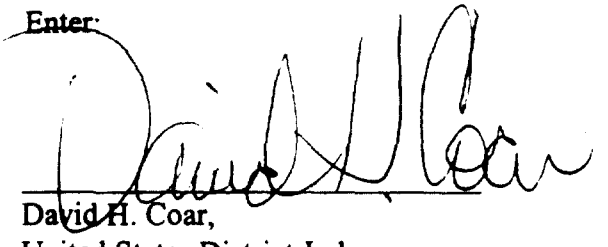
According to Ameritech, because no court order, consent decree, regulation, order, or policy of the FCC provided for the payment of reciprocal compensation prior to February 7, 1996, reciprocal compensation cannot now apply. Ameritech states that reciprocal compensation could only apply if the FCC were to explicitly so require by regulation. Such an argument is circular, and escapes the logic of this opinion. Section 251(g) merely provides that local exchange carriers must provide services with the same "equal access and nondiscriminatory interconnection restrictions and obligations" as prior to the passage of the Telecommunications Act, until such restrictions or

obligations are superseded. As this court has found that the FCC has no prior ruling that controls in the instant case, there is no ruling that could possibly be violated by ordering continued payments of reciprocal compensation by the plaintiff. Furthermore, as the defendants point out, Ameritech did indeed pay reciprocal compensation for local calls prior to the passage of the Act.

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion and Order, this court affirms the Commission's determination that Local Exchange Carriers are entitled to reciprocal compensation under the Interconnection Agreements for Internet calls. The stay of the Commission's order is continued for an additional thirty-five (35) days to allow the parties to appeal.

Enter:



David H. Coar,
United States District Judge

Dated: July 21, 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of BellSouth Corporation,	)	CC Docket No. 98-121
BellSouth Telecommunications, Inc.	)	
and BellSouth Long Distance, Inc.	)	
for Provision of In-Region, InterLATA	)	
Services in Louisiana	)	

Exhibit Y:
Gillian Testimony on Behalf of the Florida Interexchange Carriers Association, Florida PSC Docket No. 920260-TL (Nov. 8, 1993)

BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company	))))	Docket No. 920260-TL Filed: November 8, 1993

TESTIMONY OF JOSEPH GILLAN

ON BEHALF OF

THE FLORIDA INTEREXCHANGE CARRIERS ASSOCIATION

IV. Southern Bell's Private Toll Network

Q. Please describe Southern Bell's private toll network.

A. Although Southern Bell is (presently) prohibited from providing interLATA services under the MFJ, it was given permission to construct and operate an interLATA network for its own internal needs. Southern Bell exploited this opportunity by constructing a fiber-optics network with capacity that is unnecessary when compared to Southern Bell's needs. Yet, this excess capacity is more than sufficient to provide Southern Bell with a subsidized platform to provide interexchange services if its MFJ restrictions are ever lifted.

Q. How many fiber pairs did Southern Bell install for use in its private internal network?

A. Exhibit ___ (JPG-2) shows the number of interLATA fiber pairs installed in by Southern Bell between each LATA and compares the number of active pairs with those that are spare (or dark). These "dark" fiber pairs represent potential transmission capacity that only requires the addition of optronics systems to be "lit" and activated.

As this exhibit demonstrates, Southern Bell has constructed an extensive interLATA interexchange fiber optic network and a large percentage of this network lies fallow in the ground. Statewide, approximately 45% of the fiber is dark and sits idle. The cost of the entire network, as part of Southern Bell's rate base, is being recovered from ratepayers through depreciation.

This comparison, while telling, is also a conservative estimate of the excess capacity. This is because much of the fiber that is already "lit" is either unused or (possibly) under-utilized.

Q. What determines the capacity of a fiber system?

A. The capacity of an operating fiber system is determined by the speed of the optronics. The faster that the optronics can send and receive light signals, the greater the volume of data that can be transmitted, thus increasing the number of information "packages" available to transmit encoded (digital) voice conversations. Fiber capacity is typically represented in DS-3 units (where each DS-3 has the capacity of 672 voice-grade circuits). A 1.2 Gbps system has the capacity of 24 DS-3s; a 565 Mbps system has the capacity of 12 DS-3s.

Q. Have you estimated the potential capacity of this idle interLATA network?

A. Yes. Using conservative assumptions, I determine the potential interLATA capacity that Southern Bell has already installed, but which presently sitting idle. The results of this analysis are presented in Exhibit ___ (JPG-3).

Q. What assumptions were used to develop this Exhibit?

A. First, I assumed that Southern Bell activated this fiber using 1.2 Gbps systems. This is a conservative assumption; Southern Bell could deploy 2.4 Gbps systems which would double the capacity of these links.

Second, I assumed that Southern Bell continues to configure its network with 1x1 protection. This architecture requires a working "protect" fiber pair for each "active" fiber pair.[6] An alternative architecture (called nx1) would maintain one working fiber pair to protect any other fiber pair should it fail. This architecture is slightly less reliable, but requires fewer fibers. Had the alternative assumption been used, the potential capacity of the network would have nearly doubled again.

Finally, along those less dense routes where Southern Bell has installed a 565

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[6] Underscoring the conservativeness of my assumptions, wherever Southern Bell had deployed an odd number of fiber pairs (and thus could not maintain 1x1 protection on each) I assumed that the odd fiber pair continued to remain idle.

Mbps system, I estimated that additional capacity would be made available by upgrading to 1.2 Gbps.

Q. What are the results of your analysis?

A. As Exhibit ___ (JPG-3) shows, Southern Bell has a substantial interLATA network, presently being recovered through monopoly rates, that could be put to competitive purposes simply by the addition (or upgrade) of its optronics.

To put my results in perspective, I compared the potential capacity of just this idle portion of Southern Bell's network to the estimated size of the Florida toll market. A rough estimate of the traffic carrying capability of the network is 3 billion minutes per month.[7] By comparison, the entire Southern Bell toll market (intrastate) is only 400 million minutes per month, and the combined (interstate and intrastate) toll market is estimated at less than 2 billion minutes a month.

Q. Do you have any other statistics that provide perspective on the size of Southern Bell's corporate network?

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[7] This estimate assumes that each voice-equivalent circuit can carry 9000 minutes per month. This traffic loading was recently adopted by the FCC as an estimate of the usage of the access circuits serving IXCs.

A. Yes. My understanding is that the second largest interexchange carrier in Florida is LDDS Communications (successor to the Microtel network). The standard size of its Florida network is 5 fiber pairs. Southern Bell's "private" toll network is 2 to 3 times this size along most routes (between 12 and 18 fiber pairs). Even AT&T was averaging only 12 fiber pairs nationally in 1987[8] (the last year that Southern Bell initially installed its private network).

Q. Are there other sources of spare capacity that should be considered?

A. Yes. The previous analysis focused almost exclusively on the potential capacity of the fiber that is presently not used. As such, the analysis ignored capacity that Southern Bell has activated, but which may be unused or under-utilized. This capacity is created when Southern Bell installs a operating system (such as 1.2 Gbps) which provides more capacity than it needs. The operating systems installed by Southern Bell provide (statewide) 144 DS-3s of capacity, of which Southern Bell is apparently using 101. The remaining one third of the capacity can easily (and inexpensively) be used to provide competitive services. This capacity alone is sufficiently large to accommodate approximately 65% of the intrastate toll market.

Even this discussion assumes that the capacity that Southern Bell has

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[8] Source: FCC Fiber Deployment Update, March 1992.

activated (i.e., the 101 operating DS-3s) is being efficiently used and doesn't itself represent excess investment in both fiber *and* optronics. In this regard, it is useful to note that during the pendency of this proceeding Southern Bell increased its active capacity by nearly 125%, even though its switched voice traffic increased by only 2.4%. Of course, this might be explained by an "explosion" of non-switched demand on its network and my purpose isn't to quibble about each and every circuit. It is the main point that concerns me: Southern Bell has accomplished ratepayer funding of a competitively significant asset for which ratepayers have received no benefit, and which is more than adequate to position Southern Bell as a major interexchange carrier in the future.

Q. What remedy do you suggest?

A. The Commission should immediately remove the undepreciated value of the dark fiber from Southern Bell's rate base so that ratepayers cease paying for this strategic investment. Unfortunately, the potential competitive damage has largely already been done. Southern Bell has put in place a subsidized network investment that, if allowed to compete in the interexchange market, would diminish the value of competing networks (funded by private investors). The Commission may wish to consider additional remedies (such as reducing the rate base by original cost plus interest) to assure that ratepayers have

been fully reimbursed for the cost of this network should it ever be put to competitive use.

V. Summary

Q. Please summarize your recommendations.

A. First, the Commission should only renew Southern Bell's incentive regulation plan after resetting its rates to a reflect current capital conditions. In addition, the incentive plan should be modified to incorporate a new "sharing" provision so that access customers can also benefit from the plan.

Second, the Commission should adopt a coordinated strategy for the intraLATA toll market that relies on reduced access charges and customer empowerment over their intraLATA 1+ dialing to lower interexchange usage prices. A more competitive intraLATA environment is preferable to the remonopolization of the market through actions such as the "25 cent plan". Even if the Commission concludes to go forward with a "25 cent solution", however, it should not combine this action with a legal ban on competition Under *no* circumstances should the Commission approve Southern Bell's Expanded "Local" Service proposal.

Finally, the Commission should disallow Southern Bell's excess investment in its interLATA "corporate" network. This investment exceeds Southern Bell's internal communication needs and its presence in Southern Bell's regulated rate base forces monopoly ratepayers to finance a network that could subsidize Southern Bell's (hoped for) reentry into the interexchange market.

Q. Does this conclude your direct testimony?

A. Yes.

Exhibit ___ (JPG-2)
Excess Fiber Capacity

Excess InterLATA Fiber Capacity

Comparing Dark to Lit Fiber

InterLATA Route		Spare Fiber Pairs	Total Fiber Pairs	Percent Idle
Southeast	Orlando	9	18	50%
Orlando	Daytona	2	12	17%
Daytona	Jacksonville	8	18	44%
Gainesville	Jacksonville	8	15	53%
Jacksonville	Thomasville	9	12	75%
Jacksonville	Macon	3	6	50%
Panama City	Thomasville	0	3	0%
Panama City	Pensacola	0	3	0%
	Total	39	87	45%

Exhibit ___ (JPG-3)
Excess Fiber Capacity: MOU

InterLATA Capacity

Measured in DS-3s and Minutes/Month
Compared to Florida Toll Market

InterLATA Route		(1) DS-3s from:		Total Available DS-3s	Capacity in MOUs per Month (000s)
		Activation of Dark Fiber	Upgrade of Existing Fiber		
Southeast	Orlando	96		96	580,608
Orlando	Daytona	24		24	145,152
Daytona	Jacksonville	96		96	580,608
Gainesville	Jacksonville	96		96	580,608
Jacksonville	Thomasville	96	17	113	683,424
Jacksonville	Macon	24	13	37	223,776
Panama City	Thomasville	0	17	17	102,816
Panama City	Pensacola	0	17	17	102,816
Total Idle Capacity				496	2,999,808
Estimated Intrastate Toll Market					398,115
Estimated Florida Toll Market (interstate and intrastate)					1,990,576

(1) Assumes use of 1.2 Gbps system.

(2) Estimate of intrastate toll market based on Southern Bell's switched local transport minutes.

(3) Combined interstate and intrastate toll market assumes a statewide percent interstate use (PIU) of 80%.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 98-121
Application of BellSouth Corporation,	)	
BellSouth Telecommunications, Inc.	)	
and BellSouth Long Distance, Inc.	)	
for Provision of In-Region, InterLATA	)	
Services in Louisiana	)	

Exhibit Z:
MCI Comments on Further Notice of Proposed Rulemaking,
CC Docket No. 96-149 (Feb. 19, 1997)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	**CC Docket No. 96-149**

MCI COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

I. Introduction

MCI Telecommunications Corporation hereby submits its Comments on the Further Notice of Proposed Rulemaking (Notice) in the above-captioned docket. In the Notice, the Commission seeks comment on the specific public disclosure requirements necessary to implement Section 272(e)(1) of the Communications Act (Act).

Section 272(e)(1) provides that Bell Operating Companies (BOCs) "shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates." In the Non-Accounting Safeguards Order, the Commission concluded that specific public disclosure requirements are necessary to implement this section.[1] The Commission determined that, without public disclosure of

[1]In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, released December 24,

the installation and maintenance intervals for services provided by the BOC to its affiliates, competitors would not have the information needed to evaluate whether the BOCs are fulfilling requests for telephone exchange service and exchange access in compliance with section 272(e)(1).[2]

II. Reports Should Be Provided to the Commission and on the Internet

The Commission tentatively concludes that the BOCs need not submit directly to the Commission the data that must be disclosed under Section 272(e)(1).[3] Instead, the Commission tentatively concludes that the BOCs should only be required to make their Section 272 reports available to the public in one of their business offices during regular business hours. This would, however, severely limit access to the information by the Commission, the public, and the BOC affiliate's competitors. In order to facilitate convenient access to the Section 272 reports by interested parties, the BOCs should be required to post the reports on the Internet and to file them with the Commission in the same manner as ARMIS reports.

Once the BOCs have collected and assembled the data required for the Section 272 reports, the submission of this data to the Commission and the posting of this data on the Internet would impose few additional burdens and would substantially improve public

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1996, at ¶242 (Non-Accounting Safeguards Order).

[2]Id.

[3]Id. at ¶370.

access. The BOCs could, for example, maintain the Section 272 reports on the same "home page" as the affiliate transaction information whose dissemination via the Internet is required by the Accounting Safeguards Order.[4] As noted by the Commission in that context, "[t]he broad access of the Internet will increase the availability and accessibility of this information to interested parties, while imposing a minimal burden on the BOCs."[5]

III. Format for Information Disclosure

The Commission solicits comment on a proposed report format found in Appendix C of the Non-Accounting Safeguards Order. While the proposed report format has some desirable features, it should not be adopted without considerable modification. In particular, the Section 272 report format adopted by the Commission should include all of the performance indicators shown in the MCI Ex Parte.[6] A model Section 272 report format modified in this fashion is shown in Attachment A.

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[4]In the Matter of Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-150, December 24, 1996 at ¶122 (Accounting Safeguards Order).

[5]Id.

[6]Letter from Frank W. Krogh, MCI, to William F. Caton, Secretary, FCC, November 1, 1996 (MCI Ex Parte).

A. The BOCs Should Be Required to Report Installation and Maintenance Intervals for Exchange Services

The Commission's proposed report format focuses exclusively on exchange access services. Section 272(e)(1) of the Act, however, requires the BOCs to provide both exchange and exchange access services with nondiscriminatory installation and maintenance intervals. The Commission should therefore expand the scope of the Section 272 report to encompass local exchange, as well as exchange access, installation and maintenance intervals. As shown in the MCI Ex Parte, the BOCs should be required to report the local service installation interval, additional line installation interval, custom calling installation interval, local carrier change interval, and local service repair interval.

BOC reporting of local service data is necessary to detect BOC violations of the nondiscrimination provisions of Section 272(e)(1) of the Act. In the Non-Accounting Safeguards Order, the Commission determined that the BOCs' Section 272 affiliates may resell BOC local exchange services in the same manner as an unaffiliated entity.[7] To ensure that the BOC affiliate is not able to provide a bundled interLATA/local offering to a customer more quickly than an unaffiliated entity, interested parties must be able to detect if the BOC is providing exchange services to its affiliate in less time than it provides such services to unaffiliated carriers. As the Commission has noted, however, the information

[7]Non-Accounting Safeguards Order at ¶312.

necessary to detect such violations of the Section 272(e)(1) will be unavailable to unaffiliated entities unless a reporting requirement is imposed.[8]

B. The BOCs Should Be Required to Report Service Quality Measures

In the Non-Accounting Safeguards Order, the Commission concluded that the implementation of Section 272 required no reporting requirements other than those needed to ensure BOC compliance with Section 272(e)(1).[9] Consistent with the narrow focus on Section 272(e)(1), the report format proposed by the Commission in Appendix C of the Non-Accounting Safeguards Order would require the BOCs to report only installation and maintenance intervals.

The Commission should broaden the scope of the BOCs' Section 272 reports to incorporate a variety of performance indicators necessary to detect other forms of discrimination prohibited by Section 272(c) and (e). In particular, the BOCs should be required to report several service quality measures. The nondiscrimination requirements of Section 272(c) and (e) clearly prohibit the BOCs from discriminating in the quality of the access services they provide. Degradation of rivals' access services is as effective an anticompetitive strategy as the use of discriminatory provisioning and maintenance intervals. Moreover, just as information about the timeliness of the BOCs' provisioning of access

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[8] Non-Accounting Safeguards Order at ¶242.

[9] Id. at ¶321.